

HUMAN SERVICES BOARD

INTRODUCTION

The petitioner supplied the Department with current income and expense information from their accountant. The Department is seeking information about depreciation because the Department asserts that the amount of depreciation should be added to the household's income to determine countable income for child care subsidy determinations. The petitioner does not believe that the regulations require depreciation to be considered and has not provided this information. The

petitioner seeks clarification and implementation of the earlier Board Order. The parties have briefed the issues.

The issue is whether depreciation should be added to income to determine a household's countable income.

FINDINGS OF FACT

1. The Findings of Fact in Appendix A are incorporated herein.

2. On or about November 4, 2009, the petitioner supplied the Department with year to date itemized statements of income and expenses from the family farm including petitioner's wages from a local company and self-employment income through August 2009. The statement did not include depreciation. The petitioner's accountant prepared the statement. The statement showed net profit of \$6,679.21 or \$834.88 per month income for that period. A copy is attached as Appendix B.

3. On or about December 2, 2009, petitioner asked the Department whether a decision had been made.

4. On or about December 3, 2009, petitioner was advised that the Department had the information they needed to recalculate the child care subsidy.

5. On or about December 21, 2009, petitioner requested information about the recalculation.

6. On December 22, 2009, the Department requested information about depreciation. Petitioner declined to give this information based on her belief that depreciation information is not necessary to determine the household's income.

ORDER

The Department's decision is reversed. The Department should use the income and expense figures supplied by petitioner to determine the amount of petitioner's child care subsidy.

REASONS

This case raises an issue of first impression for the Board, namely, whether depreciation should be considered income when determining self-employment income of a household.

Historically, the Board has been asked by petitioners applying for other Department programs to treat depreciation as a business expense and subtract depreciation from gross receipts when determining countable income. The Board has declined to do so because the regulations specifically do not

allow for depreciation to be deducted as a business expense. None of these other programs treat depreciation as income.

For example, the Vermont Health Access Program (VHAP) allows certain business expenses to be deducted from self-employment income but not depreciation. W.A.M. 5321. In Fair Hearing No. 17,465 on page 4, the Board found the regulation displayed:

a strong policy against allowing persons to claim income eligibility for state sponsored health care who have spent their income to amass capital assets in a business. This policy is quite different from that of the Internal Revenue Service which encourages the build-up of capital assets in a business by exempting amounts spent in such a way from taxation.

See also Fair Hearing Nos. 19,771 (Dr. Dynasaur), V-06/08-282 (VPharm), and N-08/09-482 (CHAP). See also 7 C.F.R. § 273.11(b)(2) (Food Stamps do not allow a deduction for depreciation).

Depreciable assets are by definition used in the taxpayer's business or income producing activity. In terms of liability for federal income taxes, depreciation acts as a deduction and may reduce tax liability. Depreciation serves a useful function in allowing a tax-payer to amortize the costs of business assets over time. Section 167 of the Internal Revenue Code. Section 179 of the Internal Revenue Code allows a taxpayer to basically accelerate depreciation

for certain assets and treat the cost of the asset as an expense.¹

The Department wants to count depreciation as income to the family. They read the applicable regulations as allowing such a use. The petitioner disagrees.

Depreciation needs to be considered in light of the statutory and regulatory framework for the child care subsidy program. The child care subsidy program is authorized by 33 V.S.A. § 3512 whose purpose is to help families either retain or obtain work by subsidizing affordable and quality child care.

The regulations are set out in the Child Care Financial Assistance Program Regulations (CCFA). Gross income is defined as all income except for income specifically excluded under the regulations. CCFA I.B.18.

The income eligibility requirements are found in CCFA II.B.2. The section states, in part:

Gross income includes all payments from any source received by a primary caretaker(s) or their children, with the exception of children's wages. Income received

¹ In Fair Hearing No. 17,465, the petitioner argued that the Section 179 deduction should be treated as a business expense, not depreciation. But, the Board found the plain language of the regulation excluded purchase of capital equipment and did not reach the question of whether a Section 179 deduction is depreciation.

from the following sources is excluded in determining income eligibility:

1. Income received from the sale of real or personal property. . .

. . .

10. Supplemental Security Income (SSI);

. . .

14. Self-employment business expenses other than depreciation charges, Section 179, per current IRS procedures;

. . .

The above regulation states that depreciation cannot be used as a business expense. In doing so, the Department treats depreciation consistently with other programs that do not allow this particular tax deduction to be treated as a business expense for eligibility purposes.

However, the Department makes a leap in then saying that depreciation is income that should be added to the household's overall income. Part of the problem may come from the phrasing used by the Department in the regulations. Earlier, the Board addressed the lack of guidance in determining "actual" monthly gross income.

Here, the above regulation includes business expenses as "income", when business expenses are not actual income. They are a deduction used to determine self-employment income for

eligibility purposes. The problem stems from the phrasing of the regulation that includes both income and expenses. See how income such as SSI (actual money in hand) is excluded for public policy purposes versus an expense such as child support (CCFA II.B.2.11) or business expenses are excluded. The regulation, as written, attempts to determine types of income exclusions as well as allow certain deductions. The better course would be to follow the example of other programs and address deductions separately.

The Department argues that the regulations require them to add depreciation to income. However, the regulations do not do so. The regulation allows the Department to exclude depreciation as a business expense in determining self-employment income. The Board must read the regulation to give effect to the underlying statutory purpose to help families keep or obtain employment by subsidizing quality child care. Creating a legal fiction that depreciation is income does not do so.

Based on the foregoing, the Department's decision that depreciation is income for the purposes of calculating self-employment income is reversed and the Department should calculate petitioner's eligibility for a child care subsidy

based on the information provided by petitioner's accountant.

3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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